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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:

Date: 25/01/2024

Signature:

CASE No: 21300/2022

In the matter between:

T[...] F[...] C[...]

Applicant

And

B[...] J[...] C[...]

Respondent

JUDGMENT

MAHOMED AJ

This is an application for interim maintenance and a contribution toward legal costs in terms of R43 of the Uniform Rules of Court. The parties were married in community of property in 2010 and two minor children are born of their marriage. The children live with their father, the respondent, in the marital home and the applicant resides with her partner. The evidence is that both parties have moved on with their lives since they separated in February 2023.

THE EVIDENCE

1. The applicant alleged that she was forced out of her marital home, and now lives with her partner in KwaZulu Natal. She agrees that the children are better off living with their father, as he controls the family business and all finances, he can attend to their needs. She requires access to the children and a family advocate has made recommendations in that regard.¹
2. The applicant claims R25 000 per month in respect of interim maintenance and R300 000 as a contribution toward legal costs.² She contended that during their marriage she was responsible for their home, and she took care of the children. She was financially dependent on the respondent, through the years, although the respondent alleged that he had always wanted her to support herself. He annexed registration documents of companies which he alleged he registered to assist her to earn an income, however none of the businesses were successful. He accepted that she was not sufficiently skilled for the job market. There is no evidence before me regarding the performance of the companies that were registered nor the income the applicant received from any of those companies. There is no evidence before me that when she left the marital home, she was employed or earning an income. The respondent

¹ Caselines 000-18 at par 46

² Caselines 021-133

alleged that she owned two companies with her partner, however not much else is before the court in that regard, except documents which reflect that each of the entities is being deregistered.

3. The party's relationship became strained when they accused the other of engaging in extra marital relationships. The respondent has secured a protection order against her whilst she was away to attend her father's funeral. She is ordered not to assault, intimidate, or harass the respondent, she could not return to the marital home as she feared for her safety. She has two criminal matters pending, for failure to attend court, common assault, and conspiracy to commit murder. She has not seen her children in the past year and does not have the finances to visit them nor to have them over as she resides with her partner in KwaZulu Natal. The respondent has taken away her car which he had bought for her, the events in this regard are disputed.
4. The respondent is CEO of Boa Technologies CC, both parties are trustees and beneficiaries in the Family Trust, under Trust Deed 1650/2017.³ She was a director in the family business which is managed by the respondent, and she used to earn an income from Boa Technologies. The amounts she received varied, she received her last payment of R13 000 on 30 January 2023, a month before she left their

³ Caselines 021-148 at par 7.5

home.⁴ The evidence is that through the years , the respondent paid various amounts into her bank account, although this is disputed as counsel argued that the applicant received monies as an employee, notwithstanding that she received monies after she allegedly resigned from the company. The applicant claims she was wholly reliant on the respondent for her expenses. It is not disputed that he paid for all their household expenses, and they spent an average of R45 000 per month as they enjoyed a comfortable lifestyle together. Their older child is at a boarding school, he spends his holidays with his father. Their daughter lives at home with the respondent. The evidence is that the applicant is unable to afford to pay for them to visit her, nor can she afford their expenses if they joined her over the holidays.

5. The respondent denied he paid her an income on a regular basis and submitted that she was an employee and she resigned from the company in June 2021. He denied knowledge of the payslips from Boa Technologies after 2021 and amounts reflected in her bank statements. She received her last payment in January 2023. Mr Zwane proffered that the respondent is misleading the court regarding payments made to her and reiterated that she relied on him for expenses. In her financial disclosure form ⁵ the property situated in Limpopo is valued at R4 million,

⁴ Caselines 021-166 to 169.

⁵ Caselines 021-268

which is her only asset and she records liabilities at R78 305, being her legal costs to date.

6. It was proffered that the respondent can afford to pay her the interim maintenance and that he draws R120 000 per month from the business. The applicant furthermore alleged that the respondent owns several luxury motor vehicles and has various investments to the value of R100 million.⁶ It is noteworthy that the respondent's reply was a bare denial, with the applicant to prove the allegation and the extent of their joint estate.
7. The applicant submitted that she was unable to pay her attorney fees, he withdrew from her matter, whereupon he obtained a judgement for R28 000 for legal fees.⁷ She managed to persuade him to continue to represent her, whilst the respondent litigates at a much higher level, he has instructed two law firms to represent him, has been obstructive in his litigation of the divorce, as he amended his plea, filed a counterclaim for a forfeiture of benefits and filed a R30 notice. It is alleged that he merely increases legal costs, and she is forced to respond to each of issues raised. Mr Zwane referred the court to correspondence in which he suggested that the dispute be mediated however the respondent held the view that the matter cannot be mediated. Counsel for the respondent

⁶ Caselines 021-148 par 7

⁷ Caselines 021- 154-157

submitted he did not know how much the respondent has spent on his fees to date and that the respondent was under no obligation to set this out. Mr Zwane submitted that the respondent uses funds that belong to the joint estate to fund his own litigation. The applicant will require legal representation to effectively protect her half of the joint estate as the counterclaim is for a forfeiture of the benefits of the marriage. It is alleged that the respondent attempted to sell their home without her knowledge.

8. The applicant will require expert services to track assets and determine the value of the various businesses and other assets that form part of their joint estate.
9. The respondents argue that the applicant has failed to demonstrate a need and that her expenses amount to R25 000. The legal costs as depicted do not pertain to the expenses in relation to the divorce, they pertain to legal costs for various interdicts and domestic violence matters and are not costs directly related to the divorce, as contemplated in the Rule. He argued that his net income is only R71 300,⁸ and he cannot afford to pay her any monies she claims, he relies on credit to meet his monthly expenses.⁹ Mr Ndamase for the respondent reminded the court that the respondent pays for all the expenses relating to the minor children and he has never requested the applicant for any contributions.

⁸ Caselines 021-76

⁹ Caselines 021-265

10. Counsel contended that the applicant together with her partner, operated two businesses and that she failed to annex any bank statements in relation to those businesses. A table setting out her needs cannot be sufficient for purposes of this application. The respondent is heavily indebted to banks as he relies on his credit card to meet his monthly expenses. He cannot afford to support two homes; the applicant and her partner have developed a lifestyle together and they must pay bear their costs.
11. Counsel argued that the applicant alleged that the respondent has various sources of income but failed to substantiate the allegation and the onus is on her to prove them. It was submitted that there is no proper application before this court due to a serious lack of details to prove a need and accordingly, the application stands to be dismissed.
12. Counsel proffered that if the respondent is ordered to pay maintenance, he would be forced to remove his eldest child from boarding school, and that his finances are in such a dire state that it would be impossible to comply if he is ordered to pay her maintenance.

JUDGMENT

13. In *H v H*,¹⁰ Victor J stated, *“it is without doubt clear that the dispute about the care of children, the interim maintenance, and the contribution of legal costs must be viewed through the prism of the Constitution and of course in relation to the Children’s Act.”*

¹⁰ Case No. 44450/22 , 30 September 2022, at par 3

14. There appears no dispute regarding the maintenance of the minor children, and a Family Advocate has recommended rights of access to the applicant, their mother.¹¹ Rule 43 of the Uniform Rules of Court provides for interim access, maintenance, and a contribution toward legal costs, until a divorce is finalised.
15. The parties are in an acrimonious divorce, where there have been various allegations of assaults, verbal abuse, and malicious damage to property, by each of the parties. The divorce is pending, however, amendments to pleadings, counterclaims and procedural points taken delay the finalisation of this divorce. I noted that the applicant's request for a mediation of the dispute failed as the respondent held the view that the matter could not be resolved by mediation.¹² The issue between the parties is only of a patrimonial nature.
16. In my view where the facts are ascertained a mediated solution is a sensible one, particularly when parties both claim they cannot afford legal costs. Mediation presents a cost effective and efficient procedure to dispute resolution and in family disputes, they have the potential to preserve important relations between parties who continue to be parents to their children, well after the divorce. A litigant cannot plead poverty, financial pressure, and yet discount the value of this very cost effective

¹¹ Caselines 000.

¹² Caselines 021-358

and efficient method of dispute resolution. Rule 41A is available to parties and must in these difficult financial circumstances be litigants first port of call.

17. In casu, the respondent contends he is too heavily indebted and therefore he cannot pay her interim maintenance nor can he contribute to her legal costs, however he chooses to proceed by trial, incurring costs when he amended pleadings, raised a counterclaim for forfeiture, on facts that were already before him when he filed his plea, raised a R30 point, when he could have called the applicant's attorney to resolve the issue. He can "indulge" in litigation because he can afford to do so. The applicant is obliged to respond each time and she does not have the finances to do so. However, he does appear to have access to funds to pay for his litigation, although no figures are before this court to assess the level at which he litigates. He must bear the risk when he fails to fully substantiate his financial position.
18. Mr Ndamase is correct the applicant must demonstrate a need, before a court can grant the applicant an order, on an interim basis. I am of the view that she has done so, she had no home to return when she returned from her father's funeral, and she has a judgment debt for legal costs because she could not afford to pay for those services. There is no evidence before me that at the time the parties separated, she was earning an income to be able to support herself and her children. The

evidence is that she stayed over with friends and family, until she was forced to leave Johannesburg and join her partner in KwaZulu Natal. She was forced to leave her children behind and sacrifice her contact with them. She is also embroiled in certain criminal matters that may well cost her more in expenses.

19. There is no evidence before me, since her alleged resignation from their company in 2021, that the applicant had the means to look after herself. I noted the allegations that she pursued two businesses with her partner, but evidence before me demonstrated that the entities had never operated, and no bank account was ever opened for the entities.
20. It is noteworthy that the respondent continues to live in the matrimonial home, his life was never disrupted, and the evidence is that his partner now resides with him in the home. The applicant's right to a home is linked to her right to dignity.¹³ Counsel's submission that the applicant paid nothing toward the home and therefore cannot claim support to set up her home is nonsensical and cannot be countenanced. She has a right to her home qua marriage, and in terms of her marital regime.
21. The writers Heaton and Kruger¹⁴ state:

"From its beginning until its termination, a civil marriage

¹³ S10 Constitution Act 108 of 1996

¹⁴ South African Family Law, 4th ed, 2017 p44 at 5.4.1

imposes a reciprocal common law duty of support on the spouses, provided that the spouse who claims maintenance needs it and the spouse from whom it is claimed, is able to provide it. Maintenance includes the provision of accommodation, clothing food, medical services, and other necessities. The scope of the duty of support is determined inter alia by the social status of the parties and their means of income and the cost of living.”

22. In casu the parties are married in community of property, a joint estate is established, and the applicant continues to maintain a lawful interest in their home. It cannot be correct that she relies on others for her accommodation. Her dignity must be preserved and protected particularly in the eyes of her children, whom she has nurtured over the years, she remains their mother.
23. Both parties' financial disclosure documents have been wanting in detail on their assets and expenses, the respondent has not complied with the practise directive, he has not annexed bank statements over 6 months and failed to set out details of debts incurred in respect of the credit facilities. The parties bear the risk in that regard, the court must then rely on the objective evidence before it.
24. It is not disputed that the respondent was responsible for all expenses and that their household expenses were R45 000 per month. They enjoyed a comfortable lifestyle. The applicant's claim of R6 000 for accommodation is reasonable when one compares the respondent's costs of accommodation even including costs of their second child. The

respondent's living expenses for one person, appears to be high, he spends over R10 000 per month on food, R15 000 per month to service debt, there are no details before this court as to how the debt is incurred. beyond basic household costs. Counsel's submissions that his client is "drowning in debt" cannot be a defence, spousal maintenance is a legal duty and must be prioritised. Of concern is that the debt he incurs are debts of the joint estate and applicant must be supported to protect her interests in that estate.

25. I considered the applicant's table of expenses, and I am of the view that items for clothing, municipal rates, and sundries and recreation can be dispensed with. Pendente lite, R18 000 per month for living expenses is reasonable in the circumstances.

CONTRIBUTION TO LEGAL COSTS

26. The legal writer J Heaton¹⁵, stated

"It is the financially dependent spouse who applies for a contribution toward costs frequently in circumstances where the other spouse controls the family resources pending orders in respect of division of assets on divorce. The fact that the applicant spouse had no access to resources is yielded like a strategic weapon to bullying an equitable settlement from an under resourced spouse, who faces the other spouse's legal arsenal with the funds for his or her legal team."

¹⁵ The Law of Divorce and Dissolution of Life Partnerships in South Africa (Juta 2015) at p544

27. Section 9(1) of the Constitution, ¹⁶ provides,

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

28. The rationale behind the duty to contribute toward legal costs is to ensure that there is an equality of arms in the litigation of the divorce and that neither party is prejudiced.

29. In *Charmani v Charmani*,¹⁷ the court referred to a contribution toward costs is sui generis, it is an incident of the duty of support which spouses owe each other.

30. In *H v H*, supra, the court stated, *“the disadvantaged party is placed in a position to defend their case. So fundamentally, the application of the Rule 43 necessarily involves, the right to equality and Judges should, when exercising discretion, interpret and apply R43 in the light of the constitutional right to equality.”*

31. On the facts extensive legal costs have been incurred, in various applications and orders sought. More critically, the applicant must defend a counterclaim for forfeiture. It is reasonable to estimate that she will require legal and expert assistance to exercise her rights to equal protection before the law. The court notes that she has a judgement

¹⁶ Act 108 of 1996

¹⁷ 1979 (4)S 8043 (W) at 806 F-H , also Van Rippen 1949 (4) SA 634 (C)

against her for the legal services rendered to date, it is clear she cannot afford to pay for those services. The respondent has refused to mediate a settlement on a proprietary issue, the details of which could have been easily ascertained if the financial statements before this court can be relied on.

32. I noted from the financial information furnished in the “supplementary answering” papers, the respondent has access to capital, as he services credit cards and overdraft facilities, and he pays a surplus into his bond account. Furthermore, I noted that his business has performed better in the past financial year, and that he can afford to contribute to her legal costs, pendente lite, in the sum of R300 000. Any amount that is not used after taxation, must be returned.

33. In VR v VR,¹⁸ van der Linde J, stated:

*“perhaps the issue can be turned around, whether the respondent should contribute to the applicant’s legal costs is not the respondents gift to give, he has an obligation to do so.”
The applicant would not enjoy equal protection unless she is equally empowered with the “sinews of war.”*

34. Counsel for the respondent argued the applicant’s costs must be the direct costs of the divorce and although our courts have held different views in that regard, I agree that the contribution must be in respect of costs related to the divorce.

¹⁸ June 2019 par 17

Accordingly, I make the following order pendente lite:

1. The recommendations by the Family Advocate, in its report on applicant's access to the children is made an order of court.
2. The respondent shall pay R18 000 per month to the applicant for her maintenance, on the 1st day of the month.
3. The respondent shall contribute R300 000 to the applicant's attorneys for legal costs of the action, within 2 weeks of this order, any surplus is to be returned within a week of final taxation.
4. The costs of this application shall be in the cause.

MAHOMED AJ

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 25 January 2024.

Date of hearing : 29 November 2023

Date of judgment : 25 January 2024

Appearances

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